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**In re: NCE October 2007 Window
MX Group Number 306**

New NCE(FM), Dekalb, Mississippi
Facility ID No. 171740
Catholic Radio Network, Inc.
File No. BNPED-20071019AKZ

New NCE(FM), Livingston, Alabama
Facility ID No. 172733
Greene/Sumter Enterprise Community
File No. BNPED-20071017AFJ

New NCE(FM), Livingston, Alabama
Facility ID No. 173317
The Board of Trustees of the University of
Alabama
File No. BNPED-20071018AQC

Petitions for Reconsideration

Gentlemen:

We have before us the application of Catholic Radio Network, Inc. ("CRN") for a construction permit for a new noncommercial educational ("NCE") FM station in DeKalb, Mississippi ("CRN Application") and the application of Greene/Sumter Enterprise Community ("G/S") for a new NCE FM station in Livingston, Alabama ("G/S Application").¹ We also have before us a Petition for Reconsideration ("G/S Petition") filed by G/S on January 16, 2009, directed against the Bureau's decision

¹ File Nos. BNPED-20071019AKZ and BNPED-20071017AFJ

regarding its application.² Finally, we have before us a Petition for Reconsideration (“University Petition”) filed by University on February 26, 2009, directed to the dismissal of its application for a new NCE FM facility in Livingston, Alabama (“University Application”).³ For the reasons set forth below, we: (1) dismiss the G/S Petition, (2) deny the University Petition, (3) dismiss the G/S Application, and (4) grant the CRN Application.

Background. CRN, G/S and University submitted their applications during a filing window for NCE FM applications in October 2007. On June 18, 2008, the Bureau issued a public notice that identified these three applications as mutually exclusive with each other and grouped them into NCE MX Group 306.⁴ Pursuant to established procedures,⁵ the Bureau determined that the CRN Application was entitled to a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended,⁶ and identified CRN as the tentative selectee in NCE MX Group 306.⁷ The Bureau’s tentative selection of the CRN Application triggered a 30-day period for filing of petitions to deny.

While no party filed a petition to deny the CRN Application, G/S filed a Petition for Reconsideration of the *2008 Fair Distribution Order*. G/S argues that its application does not conflict with the CRN Application and would prevail in a points hearing over University’s Application, with which its application does conflict.⁸ Thus, G/S urges grant of its application too. University opposes the G/S Petition. University argues that the G/S Petition is premature and procedurally defective.⁹ University also notes that its application conflicts with the G/S Application and thus is “an obstacle to grant” of the G/S Application.¹⁰ Like University, CRN asserts that the G/S Petition is procedurally defective. However, CRN does not oppose the G/S Petition. Rather, CRN urges the Commission to grant its application immediately and to consider the arguments made by G/S in a separate proceeding.¹¹ In its

² The Board of Trustees for the University of Alabama (“University”) filed an Opposition to Petition for Reconsideration on January 29, 2009 (“University Opposition”), and G/S filed a Reply on February 9, 2009 (“G/S Reply”). In addition, CRN filed Comments on Petition for Reconsideration on February 9, 2009 (“CRN Comments”).

³ G/S filed Comments Supporting Petition for Reconsideration on March 6, 2009 (“G/S Comments”).

⁴ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008). The Bureau included a fourth application filed by Internation Religious and Cultural Exchange, Inc. (“IRCE”) in NCE MX Group 306. File No. BNPED-20071019BDM. The Bureau dismissed the IRCE Application at the same time it dismissed the University Application. FCC, Public Notice, Broadcast Actions, Report No. 46909 (Jan. 27, 2009) at 8, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-288090A1.pdf (“*Dismissal Public Notice*”). IRCE did not challenge this dismissal, which is now final. Thus, we omit further discussion of the IRCE Application.

⁵ See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE Comparative Order*”); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) (“*NCE Comparative MO&O*”), reversed in part on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

⁶ 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases. See *NCE Comparative Order*, 15 FCC Rcd at 7397.

⁷ See *Threshold Fair Distribution Analysis of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 23 FCC Rcd 17983, 17985, 17998 (MB 2008) (“*2008 Fair Distribution Order*”).

⁸ G/S Petition at 2.

⁹ University Opposition at 2.

¹⁰ *Id.* at 3.

¹¹ CRN Comments at 2-3.

Reply, G/S concedes that its Petition was premature and procedurally defective¹² but goes on to urge grant of either its or University's Application in addition to the CRN Application.¹³

After the filing of the G/S Petition but prior to the submission of any pleadings in response to that Petition, the Bureau dismissed University's application.¹⁴ University filed a Petition for Reconsideration of this action, seeking reinstatement of its application *nunc pro tunc*.¹⁵ University argues that staff did not dismiss the G/S application and that, "as a matter of fundamental equity," its application must be reinstated.¹⁶ University urges the Commission to grant its or the G/S Application in addition to the CRN Application.¹⁷ G/S filed comments in support of the University Petition.¹⁸

Discussion. At the outset, we find that the G/S Petition is procedurally improper. Section 1.106(a)(1) of the Commission's Rules specifically prohibits petitions for reconsideration of interlocutory actions.¹⁹ The 2008 *Fair Distribution Order*, which did not dispose of a single application in NCE MX Group 306, clearly was an interlocutory action.²⁰ Accordingly, we dismiss the G/S Petition.²¹

In addition, based on controlling Commission case law, we deny the University Petition. In the *NCE Comparative MO&O*, the Commission considered a geographic-based processing proposal that would have sanctioned the tentative selection of more than one applicant in a mutually exclusive application group.²² The Commission rejected this proposal, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in the selection of an inferior applicant as a secondary selectee.²³ Instead, the Commission determined that the better approach would be to dismiss all non-selected applicants in a group, even if a particular application is not mutually exclusive with the

¹² G/S Reply at 3.

¹³ G/S Reply at 2, 5.

¹⁴ *Dismissal Public Notice* at 6

¹⁵ University Petition at 1, 5.

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 4.

¹⁸ G/S Comments at 6-7.

¹⁹ 47 C.F.R. §1.106(a)(1).

²⁰ See *Bennett v. Spear*, 520 US 154, 178 (1977) (holding an agency's action is final and reviewable only if, *inter alia*, it "mark[s] the 'consummation' of the agency's decision making process - it must not be of a merely tentative or interlocutory nature.") (internal quotes and cites omitted). See also 2008 *Fair Distribution Order*, 23 FCC Rcd at 17985, 17998 (explaining that "CRN is the tentative selectee in Group 306. . . . [that the] Application filed by Catholic Radio Network, Inc. (File No. BNPED-20071019AKZ) is . . . TENTATIVELY SELECTED. . . . [and that a] a 30-day petition to deny period . . . concerning the grantability of the tentative selectee's application [would run]") (emphasis in original).

²¹ Because we find that the G/S Petition was prematurely filed, we need not address whether GS failed to serve copies of the Petition on the other parties, as alleged by both University and CRN. In addition, we find CRN's request for severance moot as we act on both the CRN Application and the G/S Petition herein. Finally, we note that the arguments made in the G/S Petition regarding grant of an additional application from NCE MX Group 306 are properly before us as a result of University's challenge to the dismissal of its application. We address them herein as a result.

²² *NCE Comparative MO&O*, 16 FCC Rcd at 5104.

²³ *Id.* at 5105 (" . . . after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they *are* mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to

primary selectee of the group.²⁴ Therefore, we reject the arguments that either the University or the G/S Application should be granted after further proceedings based solely on its position in the mutually exclusive chain and the absence of any direct conflict with the tentative selectee, CRN. Accordingly, we affirm the staff dismissal of the University Application and herein dismiss the G/S Application.²⁵

Additionally, we have examined the CRN Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant will further the public interest, convenience, and necessity.

Conclusion/Action. IT IS ORDERED, that the Petition for Reconsideration filed by Greene/Sumter Enterprise Community on January 16, 2009, IS DISMISSED.

IT IS FURTHER ORDERED that the application for a new noncommercial educational FM station at Livingston, Alabama (File No. BNPED-20071017AFJ) filed by Greene/Sumter Enterprise Community IS DISMISSED.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed by The Board of Trustees of the University of Alabama on February 26, 2009, is DENIED.

Finally, IT IS FURTHER ORDERED THAT the application for a new noncommercial educational FM station at DeKalb, Mississippi (File No. BNPED-20071019AKZ) filed by Catholic Radio Network, Inc. IS GRANTED subject to the condition that Catholic Radio Network, Inc. must operate technical facilities substantially as proposed for a period of four years of on-air operations.²⁶

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Catholic Radio Network, Inc.
Greene/Sumter Enterprise Community
The Board of Trustees of the University of Alabama

file again in the next filing window.”) (emphasis in original).

²⁴ *Id.* The Commission recently reiterated that only one application from each mutually exclusive group would be granted and that the remaining applications, even if not mutually exclusive with the tentative selectee, should be dismissed. See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716 (2010) (“Finally, we note that we previously concluded that only one application should be granted out of each mutually exclusive group, while providing the competing applicants the opportunity to file again in the next filing window. Accordingly we direct the staff to deny petitions for reconsideration based on the theory that the dismissed application is not mutually exclusive with the granted application.” (internal citations omitted)).

²⁵ Both G/S and University may refile their applications in the next available NCE filing window.

²⁶ See 47 C.F.R. § 73.7002(c).